**NO. 48320-3**

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DOUGNYL AKEANG, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 15-1-00093-6

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# BRIEF OF RESPONDENT

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MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When the defendant was charged for two offenses arising out of different conduct, did the defendant waive joinder when he did not make a motion for such before the trial court?

2. Was joinder mandatory when the defendant was charged separately for two offenses arising out of different conduct? (Appellant's Assignment of Error 1)

3. Was defense counsel deficient when he objected to the amended charges on grounds other than joinder and won an acquittal for his client on the most serious charge? (Appellant's Assignment of Error 2)

B. STATEMENT OF THE CASE.

1. Procedure

Dougnyl Akeang, hereinafter "defendant" was charged with one count of unlawful possession of a firearm and one count of possession of a

stolen vehicle. CP 6-7[1]. The trial ended in a mistrial as the jury was unable to reach a verdict on either charge. CP 32-40, 1RP 92-96, 101[2].

The State subsequently filed a second amended information that added one count of theft in the third degree and dropped the charge of possession of a stolen vehicle. CP 43-44. Defense counsel objected to the second amended information. 1RP 99-100.

At the retrial the defendant was convicted of theft in the third degree and acquitted of unlawful possession of a firearm. CP 83-84. On October 29, 2015 the defendant was sentenced to 364 days confinement with no days suspended and credit for 298 days served. CP 91-95. A timely notice of appeal was filed by the defendant. CP 99.

2. Facts

On January 3, 2015 Officer Andrew Bond of the Puyallup Police Department was dispatched just before 1:00 A.M. to a Wal-Mart in Puyallup for a shoplift in progress. CP 3. Officer Bond learned that the vehicle the attempted shoplifters were in was a green Dodge Caravan and was provided a license plate number. *Id.*, RP 32-33. Officer Bond saw the

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[1] The original information only charged the defendant with unlawful possession of a firearm. CP 1-2. In the amended information, for which he was tried, the charge of possession of a stolen vehicle was added. CP 6-7.

[2] The Verbatim Report of Proceedings from the first trial are designated 1RP. The VRPs from the retrial are in four volumes with consecutive pagination and are designated RP. Both appellant and respondent are utilizing the same designations.

vehicle pass him and conducted a traffic stop. RP 34. Once Officer Bond activated his emergency lights, the Dodge Caravan slowed down, pulled over to the shoulder, and continued for approximately 150 feet before it came to a stop. RP 34-35.

Officer Bond identified the driver of the Dodge Caravan as the defendant, based upon the driver's license which he was provided. RP 34-35. During the stop Officer Bond learned from a juvenile passenger in the car, who was reported as being missing from Tacoma, that the occupants of the car had stolen alcohol from a Safeway, located at 611 South Meridian in Puyallup, in the vehicle. CP 3, RP 36-37, 82-83. The defendant admitted to Officer Bond that the stolen alcohol was under the back seat of the van. RP 37.

Officer Eric Barry went to assist Officer Bond during the stop of the Dodge Caravan. RP 95. Officer Barry conducted an inventory of the vehicle where he discovered a 9-millimeter Ruger P-85 underneath the driver's seat of the vehicle. RP 79-80, 97-99.

On January 3, 2015, Bryce Smith, a Safeway employee, saw two men place alcohol under their jackets and exit the store. RP 156. After finishing checking out a customer, Smith went to the review the security footage. There, he was able to confirm that two individuals had taken alcohol and had left the store without paying. RP 157-158.

Laurie Woloszyn's dark green Dodge Caravan was taken from her house on either January 2 or January 3, 2015. 1RP 72. She did not discover that the vehicle was stolen until 11:00 a.m. on the morning of either January 3 or January 4, 2015. 1RP 84. Woloszyn discussed the vehicle being stolen with the Auburn police three days later. 1RP 86. A stolen vehicle report was not filed with the police until six days after Woloszyn discovered that the vehicle was missing. *Id.*

C. ARGUMENT.

1. DEFENDANT WAIVED THE ISSUE BY FAILING TO MOVE FOR JOINDER BEFORE THE SECOND TRIAL.

Superior Court Criminal Rule (CrR) 4.3.1(b)(2) states that a defendant's failure to move for joinder constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged. CrR 4.3.1(b)(2). A defendant who had been tried for one offense may thereafter move to dismiss a charge for a related offense. CrR 4.3.1(b)(3). Such a motion must be made before the second trial. *Id.*

In the present instance, the defendant did not move for joinder of related offenses. The record shows that the defendant was on notice that he had been charged with theft in the third degree in Puyallup Municipal Court. RP 5, 42. During the initial trial the defendant was not charged with theft in the third degree in Pierce County Superior Court because of a

"concurrent jurisdiction" issue between Municipal Court and Superior Court. RP 42. At that time, the theft in the third degree charge had already been charged in Puyallup Municipal Court. RP 5[3]. Therefore, the defendant was on notice that he was charged with theft in the third degree. He had the opportunity to move for joinder at the time of the first trial.

While defense counsel opposed the re-arraignment, the record indicates that the basis of the objection was not because of joinder. It was so that he could have additional time to investigate and be sufficiently prepared for the trial. 1RP 99. Thus, defense counsel generally objected, but made no objection regarding joinder. The waiver provision of CrR 4.3.1(b)(2) still applied. Further, the objection was made prior to the conclusion of the first trial, not prior to the second trial. 1RP 99.

Previous cases have found that an exception to waiver occurs when the defendant had no notice about other charges. *See* ***State v. Dixon***, 42 Wn. App 315, 317, 711 P.2d 1046 (1985). Knowledge must be acquired at such a time and manner as to allow the defendant a reasonable opportunity to assess the information and react. ***State v. Holt***, 36 Wn. App. 224, 229, 673 P.2d 627 (1983). Here, the defendant's case had been charged in Puyallup Municipal Court. He was in custody for for arraignment. The

[3] While it is not in the record from either of the two Superior Court cases, the defendant was indeed charged in Puyallup Municipal Court under cause number 5z0032052 for theft in the third degree.

defendant had notice about the theft in the third degree. He had the opportunity to decide whether to move for joinder. Because the defendant failed to do so, his objection to joinder is waived.

2. IN THE ALTERNATIVE, IF THE DEFENDANT DID NOT WAIVE THE RIGHT TO JOINDER, JOINDER WAS NOT REQUIRED AS THE CHARGES FOR POSSESSION OF A STOLEN VEHICLE AND THEFT IN THE THIRD DEGREE AROSE FROM DIFFERENT CONDUCT.

CrR 4.3.1 requires a joinder when two or more offenses are related. ***State v. Gamble***, 168 Wn.2d 161, 167-168, 225 P.3d 973 (2010). "Related offenses" are two or more offenses that are within the jurisdiction and venue of the same court and are based upon the same conduct." *Id.* at 168, ***State v. Watson***, 146 Wn.2d 947, 957, 51 P.3d 66 (2002). "Same conduct" is defined as conduct that arises out of a single criminal incident or episode. *Id.* Offenses involving separate incidents do not constitute same conduct for purposes of the mandatory joinder rule. ***State v. Lee***, 132 Wn.2d 498, 504, 939 P.2d 1223 (1997). Even when some of the alleged criminal activity is the same, that is not enough to conclude that all of the offenses are based on the same conduct. *Id.* at 505. In the current instance the defendant's conduct does not fall within the definition of "same conduct."

Factually, there are key differences between the charge for possession of a motor vehicle and theft in the third degree. The Dodge Caravan was taken at some point on either January 2 or January 3, 2015. 1RP 72. The van was discovered missing shortly before 11:00 a.m. on January 3. 1RP 84. The alcohol was stolen from Safeway at approximately 12:30 a.m. on January 3, 2015. RP 154. Additionally, the van was taken from the driveway of a private residence while the alcohol was taken from a store. 1RP 73, RP 155. The vehicle was not reported stolen until six or seven days after the defendant was arrested for theft in the third degree. 1RP 72. Because these are separate incidents they do not constitute the same conduct for mandatory joinder as stated in ***State v. Lee***, 132 Wn.2d at 504.

While theft and possession may be related charges, the same conduct needs to be present for joinder to be mandatory. ***State v. Dallas***, 126 Wn.2d, 324, 329, 892 P.2d 1082 (1995). ***Dallas***, however, is different factually from the case at hand. In ***Dallas***, the prosecutor attempted to amend a charge of third degree possession of stolen property to third degree theft for the same item (a Walkman and tape). 126 Wn.2d at 327. The court found that this was the same conduct. ***Dallas*** 126 Wn.2d at 329. As previously mentioned, in the current case, the theft and possession charges do not arise from the same conduct. Rather, they arise from two

distinct incidents at two different locations with two different items. So, for the purposes of this case, theft and possession are not related charges and as such, joinder was not required.

The case at hand is very similar factually to ***State v. Collins***, 30 Wn. App. 247, 633 P.2d 135 (1981). In ***Collins*** the defendant pled guilty to taking and riding in a motor vehicle without permission. ***Collins***, 30 Wn. App. at 248. He was later arrested for possession of stolen property. *Id* at 249. The defendant argued that the prosecutor had sufficient evidence and probable cause to charge the defendant with possession of the stolen property at the time of his guilty plea. *Id.* Division I found that because the crimes were distinct legally, as well as factually, they were not the same conduct[4]. In ***State v. Mitchell***, 30 Wn. App. 49, 631 P.2d 1043 (1981), Division I held that because a burglary for which the defendant was charged was not a related offense to six other burglaries committed by the same defendant, mandatory joinder was not required. ***State v. Mitchell***, 30 Wn. App. at 55.

Here, the possession of a stolen vehicle and theft in the third degree were two separate incidents that were distinct legally. Possession

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[4] At the time that ***Collins*** was decided the rule for mandatory joinder was codified as CrR 4.3(c)(3) with the term "the same or similar character" being used instead of the current usage of "same conduct." Mandatory joinder as a separate section in the Criminal Rules was adopted June 13, 1995 with an effective date of September 1, 1995 and was redesignated at Rule 4.3.1 effective April 3, 2001.

of a stolen vehicle requires that the State proves that the defendant knowingly received, retained, possessed, concealed, or disposed of a stolen vehicle knowing that it had been stolen and withheld or appropriated the same to the use of any person other than the true owner. RCW 9A.56.140, 9A.56.068. Theft in the third degree requires that the State proves that the defendant wrongfully obtained or exerted unauthorized control over the property of another with the intent to deprive them of their property and that the property has a value of less than seven hundred fifty dollars. RCW 9A.56.020, 9A.56.050. Hence, the key difference is that for possession of a stolen vehicle the State needs to prove that the defendant knowingly possessed a stolen vehicle, while for theft in the third degree, it needs to be shown that the defendant meant to deprive another of their property which has a value of less than seven hundred fifty dollars.

In the current case different elements mean that joinder was not required. First, possession and theft are two distinct crimes with different elements that need to be proven. Second, although the value of the Dodge Caravan is not mentioned in the record, one can reasonably assume that a car has a value greater than seven hundred fifty dollars. Assuming, arguendo, that the van does have a value of more than seven hundred fifty

dollars, legally, the theft of the van could not be theft in the third degree due to the value of the van.

### 3. DEFENDANT FAILS TO SHOW DEFICIENCY OF COUNSEL AND PREJUDICE THEREBY.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to

trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. 668 at 689. This court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). This Court has previously found that when joinder is not mandatory, counsel is not deficient for failing to move to dismiss under the mandatory joinder rule, because the trial court should have denied such a motion. ***State v. Downing***, 122 Wn. App. 185, 191-192, 93 P.3d 900 (2004).

Here, the decision of counsel not to move for joinder was likely part of counsel's overall strategy or tactics. Counsel may have determined

that the best course of action for his client was not to join the cases. Counsel may have decided that proceeding in this manner was in the interests of judicial economy where the misdemeanor would run concurrently to any felony convictions, even if the conduct from each crime was different. Counsel may have also attempted to achieve a global settlement of all cases.

In the present instance, the defendant cannot show deficiency of counsel for failing to move to dismiss the third degree theft charge under the mandatory joinder rule. Because the crimes in this case, possession of a stolen vehicle and theft in the third degree, do not arise from the same conduct, a motion for mandatory joinder should have been denied by the trial court. As such, defense counsel was not ineffective for not moving for mandatory joinder. Hence, the defendant fails both prongs of the ***Strickland*** test.

Defense counsel vigorously and effectively represented the defendant. Defense counsel's advocacy at trial resulted in a hung jury for the first trial on two felonies, possession of a stolen vehicle and unlawful possession of a firearm. CP 41, 1RP 93-95. The second trial resulted in an acquittal on the felony charge, unlawful possession of a firearm. CP 83. After the first trial the State decided not to continue to prosecute possession of stolen property. CP 43-44. The only charge after two trials

of which the defendant was convicted was a misdemeanor. CP 84. Far from being ineffective, defense counsel's advocacy and representation resulted in an acquittal and dismissal of two felony charges.

D. CONCLUSION.

This Court should find that the defendant waived their right to joinder as they failed to move for such prior to the second trial. In the alternative, this Court should find that mandatory joinder was not required as possession of a stolen vehicle and theft in the third degree arose from different conduct. As such, defense counsel was not deficient by not moving for joinder prior to the second trial. For the foregoing reasons the

Court should affirm the defendant's conviction for theft in the third degree.

DATED: AUGUST 5, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Nathaniel Block
Appellate Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

# PIERCE COUNTY PROSECUTOR

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